No. 261.

FILED
MAR 31 1902
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

Brf. of Brief for D. C.

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THOMAS P. KENNARD,
Plaintiff in Error,

v.

THE STATE OF NEBRASKA,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF THE STATE.

A. S. TIBBETS,
Attorney for Plaintiff in Error,

F. N. PROUT, *Attorney General,*
NORRIS BROWN, *Deputy,*
Attorneys for Defendant in Error.

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BRIEF OF THE STATE.

Statement.

This is a proceeding in error, prosecuted by plaintiff in error, from a judgment rendered against him by the supreme court of the state of Nebraska. The controversy between the parties to this cause arose over a certain contract entered into between Kennard and the governor of the state. The authority of the governor to make the contract is based on a resolution passed by the legislature

of the State of Nebraska in 1873. The resolution is as follows:

"Be it resolved by the Legislature of the State of Nebraska:

"That the governor be and he hereby is authorized and empowered to appoint an agent or agents, in behalf of the state, to prosecute to final decision before congress, or in the courts, the claim of this state for the five per cent. due to the same from the United States, upon the land of this state disposed of by Indian reservations, and by the location of military land warrants and land scrip issued for military service in the wars of the United States, and for agricultural college scrip, and railroad lands; and,

"Whereas, the government of the United States has allowed various states large amounts of swamp and overflowed lands lying within their borders; and,

"Whereas, no such allowance of swamp and overflowed land has ever been received by this state for the large area of land lying within its limits subject to overflow; now, therefore,

"Be it resolved by the Senate and House of Representatives of the State of Nebraska:

"That the governor is hereby authorized and empowered to appoint a competent and reliable agent, or agents, as provided in section one of this act; and that said agent or agents shall receive such compensation from said lands, or money, as may be agreed upon by said agent or agents, and the governor, conditioned that the state shall be put to no expense whatever, unless said agent or agents shall be successful, in whole or in part, in securing the aforementioned claims: Provided, that the foregoing shall, in *nowise*, apply to the five per cent. cash school fund accruing to the state." Gen. Stats. Neb. 1873, p. 869.

The contract is as follows:

"STATE OF NEBRASKA, EXECUTIVE DEPARTMENT.
LINCOLN, October 15, 1874.

"That whereas the legislature of the State of Nebraska, passed a joint resolution relative to the appointment of an agent or agents for the collection of the amount due from the United States to the State of Nebraska, on ac-

count of lands in this State disposed of by the Indian reservations, military land warrants and land scrip issued for military services in the wars of the United States for agriculture college scrip and for the recovery of swamp and overflow lands due the state approved February 8, 1873, a certified copy of which is hereto attached and made a part of this agreement;

"Now therefore in pursuance of the object and intent of said joint resolution and by the power and authority vested in me by the same, I, Robert W. Furnas, governor of the State of Nebraska, do by these presents appoint an agent, Thomas P. Kennard and with him stipulate as follows: In consideration that the said Thomas P. Kennard shall diligently and to the best of his ability prosecute and collect the claims specified in said joint resolution and upon the terms therein specified and contemplated, he, the said Thomas P. Kennard, shall have and be entitled to receive for his services in the premises fifty per cent. of the amount so collected, the remaining fifty per cent. of the amount so collected to be paid over to the said Robert W. Furnas governor of Nebraska or his successor in office for the use and benefit of the State of Nebraska, as by law in such cases made and provided. Provided that it is hereby distinctly understood and agreed that no charge shall be made to the state for any expense or services of whatever kind or nature in case of failure to collect money or lands contemplated in the joint resolution authorizing this contract; to all of which the contracting parties agree as witness their respective signatures the day and year above written." Printed Record p. 19.

Argument.

There was practically no dispute as to the facts on the trial of this case, as shown by the record. The final adjudication of the rights of the parties by the supreme court of the state of Nebraska, as shown by the opinion of the court was based solely on the interpretation to be gives section 12 of the Enabling Act passed by congress, which is as follows:

"And be it further enacted that five percentum of the

proceeds of the sales of all public lands lying within said state, which have been or shall be sold by the United States prior or subsequent to the admission of said state into the union after deducting all expenses incident to the same, shall be paid to the said state for the support of the common schools." 13 U. S. Stats. at Large, p. 49.

The lands in the Indian reservation for which the government paid the five percentum named in the section above quoted and one-half of which the plaintiff in error seeks to recover from the state for services under his contract were not opened by the government for public purchase until 1878. At the time the resolution was passed they were known as the Pawnee Indian Reservation and occupied by the Indians. From the resolution of the legislature in 1873 it is apparent that the state intended to claim a share of these lands under the Enabling Act even though they were being occupied by the Indians. Kennard's employment was for the purpose of prosecuting that claim before the federal department and courts. The federal government was of the opinion that the state had no right, or title, or interest in any of the lands in the Indian reservation, up to the time the reservation was opened for public occupancy and the rights of the Indians were terminated. In 1878 the federal government opened the reservation to the public for settlement, the Indians having abandoned the lands. The moneys received by the state from the government, and which are the subject of this controversy, are the percentum arising from the sale of those lands to the public since 1878. There never was any contention between the state and the government about this money belonging to the state. There was never any need of an agent to prosecute this claim, and it is obvious from the express terms of the contract itself that Kennard was not employed for the purpose of collecting these funds from the federal government, about which there was no dispute. His employment was to recover

for the state and its use moneys and lands due from other sources, and for these lands while still an Indian reservation. Such is the express provision of the contract, for it is stipulated therein "that the foregoing shall in nowise apply to the five percentum cash school fund accruing to the state"; and such must have been the understanding of Kennard himself, for by his own testimony it appears that he first filed a claim in behalf of the state for five per cent. of the value of these lands at a price fixed by himself. In other words, he was undertaking to recover five per cent. of their value while they were still being occupied by the Indians and before they were sold by the government; but the moment the lands ceased to be an Indian reservation by act of congress and were abandoned by the Indians and were opened to public purchase and *were sold* by the government, then they were beyond and without the scope of his employment and were within the exception contained in his contract which expressly forbade him receiving any commission for the collection of the five percentum cash school fund.

The testimony of Mr. Kennard himself was to the effect that the claim as filed and presented by him at Washington, while the Indians were occupying these lands, was rejected by the government and that the five percentum afterwards paid directly to the state was paid voluntarily by the government after the Indians had left the reservation and after the lands had been sold subsequent to January 1, 1878. (Pages 39, 40, 41 and 42 of printed record.)

This is corroborated by plaintiff's exhibit 1, being a statement from the land department. (Pages 45 and 46 of printed record.)

Plaintiff's exhibit 4 on page 48 of the printed record discloses that the government recognized these lands as public lands and expressly treated them as within section 12 of the enabling act, and on account of that fact acknowledged itself indebted to the state of Nebraska to the ex-

tent of five percentum of the proceeds of their sale, under the terms thereof for the use of the schools of said state.

All lands owned by the general government and subject to sale or other disposal under general laws are public lands.

The controlling question in this case is, were the lands known as the Pawnee Indian reservation at the time of Nebraska's admission into the union public lands within the meaning of section 12 of the Enabling Act?

We contend they were, for the reason that the fee title to said lands was in the United States and they were subject to sale or other disposal. "The words 'public land' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." (*Newhall v. Sawyer*, 92 U. S., 763; *Wirth v. Branson*, 98 U. S., 118.)

The Pawnee Indians occupied the lands in question but they had no title thereto, either legal or equitable. Their sole claim and interest in them began with their occupancy thereof and ended with their departure therefrom. It will not be disputed that by an unbroken line of decisions of this court the law is settled that the fee title remains in the United States until by express grant it is severed; a grant to use and occupy lands does not convey title. By treaty congress authorized the Pawnee Indians to ocupy said reservation but at no time did congress attempt to invest them with title.

We think that *Buttz v. Northern Pacific Railroad Co.*, 119 U. S., 55, is decisive of this case. These were the facts in that suit, briefly stated:

Congress had granted to the railway company certain lands to aid in the construction of a railroad and telegraph line from Lake Superior to the Pacific Ocean. Some of the lands were within the territory of Dakota and were a part of the reservation occupied at the time by the Sioux Indians. After the abandonment of the reservation by the Indians a citizen, with all the qualifications of a pre-

emptor, entered upon the land in dispute with the intention of securing pre-emption rights under the law, built a house thereon and occupied it. On these facts the railroad contended it became the owner in fee of the land encumbered only by the right of occupancy by the Indians at the time of the grant by congress. The pre-emptor claimed that at the time of the grant the United States not being in possession of the land was powerless to convey the fee title to the company and therefore the company was not the owner thereof; which, if true, gave him the right to obtain it by pre-emption. The supreme court held against the contention of the pre-emptor and in effect said that all Indian lands occupied in common by the Indians, whether these lands be reservation or not, are public lands, the fee-simple title to which is in the United States; that the Indian is the ward of the nation and his only interest and title to the lands of which he is in possession is the right of occupancy.

Such being the law as settled by the highest court of the land, then the judgment of the supreme court of Nebraska must be correct. The application of the rule to the facts in this case is stated so well by RAGAN, C., that we quote:

"We think, therefore, that when Nebraska was admitted into the union the lands of the "Pawnee Indian reservation" were public lands, the fee-simple title was in the United States, and the Indians had only the right of occupancy in those lands, and that an absolute grant by congress to the state of all public lands within her borders would have invested the state with the title to the lands of the 'Pawnee Indian reservation,' incumbered only with the Indians' right of occupancy. The United States then, by paying into the state treasury, at the request and solicitation of Mr. Kennard, of five per cent. of the sale of these Indian reservation lands, were simply performing the grant made by the nation to the state by section 12 of the enabling act, as by the grant the United States promised to pay to the state not only five per cent. of the proceeds of all public lands lying within the state and

which had prior to that time been sold by the United States, but also to pay to the state five per cent. of the proceeds of all public lands lying within the state which might after the date of the grant be sold by the United States. The fact that the United States sold these lands and put the money to the credit of the Pawnee Indians is not a consideration of any importance in determining whether these "Pawnee Indian reservation" lands were public lands within the meaning of the enabling act. The thing of controlling importance is that the fee-simple title to these lands was in the United States. They were, therefore, public lands, and the promise was that when sold by the owner it would pay five per cent. of the proceeds of the sale to the state." *State v. Kennard*, 57 Neb., 716.

The argument of the learned counsel for plaintiff in error, that these lands were not public lands because they were occupied by the Indians under a treaty which is the supreme law of the land, is to say that the $27,000 of which he now claims one-half, was wrongfully and unlawfully collected. For, if the United States had no title to these lands, if they belong under the treaty to the Indians, if they were not public lands, then the state of Nebraska was entitled to no per cent. of their value or of the proceeds of their sale and the government was defrauded by this collection. We very seriously question the right of recovery against the state in this suit when it is based on a theory so obnoxious to good faith and public policy. Kennard was not employed to prosecute a fraudulent claim, and yet, that is what he did if his present contention and argument be sustained.

Respectfully submitted,

THE STATE OF NEBRASKA,
By F. N. Prout, *Attorney General*.
Norris Brown, *Deputy*.

Lincoln, Nebraska, March 24, 1902.